No. 7344

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WELLS FARGO BANK & UNION TRUST CO. (a corporation),

Appellant,

vs.

WILLIAM C. McDUFFIE, as Ancillary Receiver of Richfield Oil Company of California,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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To the Honorable Curtis D. Wilbur, William H. Sawtelle and Francis A. Garrecht, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

A rehearing of this controversy is respectfully, but earnestly, requested by appellee. While the reasons upon which this request is predicated are hereinafter particularized, the principal ground urged by appellee is that the decision of this controversy by this court resulting in a reversal of the judgment entered by the court below in favor of appellee, is in our opinion based upon an assumption of facts not justified by the record, and a determination as to the law at variance and inconsistent with legal principles, the

accuracy of which has been demonstrated by utterances of appellate judicial tribunals of eminent authority, including this court, and, in at least some instances, expressly given recognition by appellant in its brief.

The particular grounds upon which such rehearing is requested are hereinafter discussed under appropriate headings.

FOREWORD.

At the very threshold of this petition we respectfully draw the court's attention to the fact that although the judge of the lower court made findings of fact which were addressed to the issues and bear witness to the painstaking care with which he determined questions of fact based upon evidence to some extent conflicting, given by witnesses whose conduct and demeanor while testifying he personally observed, no mention of or reference to these findings is made in the statement of the case or in the opinion of this court, but on the contrary this court has undertaken to weigh the evidence and determine the facts as though it were a trial court, and this without having had the benefit of opportunities peculiarly possessed by the trial judge.

If, as recognized by this court, this controversy was instituted as a proceeding in equity, yet when tried it took the form of an action at law and was determined as such, it would follow that the findings of the lower court based upon conflicting evidence are

controlling in this court. On the other hand, if the proceeding when tried was still one in equity, unless the decision of the lower court upon the questions of fact involved was clearly erroneous, such determination ought not to be interfered with by an appellate court.

This rule, heretofore consistently adhered to, has, we insist, been ignored by this court in reversing the judgment entered in favor of appellee in the court below. We may therefore submit that appellee is entitled to ask the careful consideration of this petition presented to this court as an appellate court which has reversed judicial ascertainment of the facts found by the trial court.

Our duty, therefore, to this court makes it obligatory in this petition to refer somewhat at length to the evidence. Our apology for the length of this petition is traceable to this circumstance.

I.

THE HOLDING BY THIS COURT THAT PAROL EVIDENCE WAS CONFINED TO PROOF OF THE DELIVERY OF THE BILLS OF LADING ALONE IS ONE OF ORIGINAL IMPRESSION BY THIS COURT, IN CONFLICT WITH THE CONTENTION OF BOTH PARTIES AND THE ADMISSIONS OF APPELLANT AND WAS NEITHER DISCUSSED NOR GIVEN CONSIDERATION IN THE BRIEF FILED BY EITHER OF THE PARTIES HERETO. BY THIS HOLDING, APPELLEE HAS BEEN DEPRIVED OF A JUDGMENT OBTAINED BY HIM UPON A THEORY WITH RESPECT TO WHICH HE HAS NOT BEEN ACCORDED THE OPPORTUNITY OF BEING HEARD.

In its opinion this court upon this subject used the following language:

"It is agreed that the acceptance agreement, although in writing, does not of itself sufficiently identify the documents or security which was the subject matter of the contract between the parties without the consideration of parol evidence." (p. 7.)

It is also stated:

"The appellee correctly contends that the written agreements must be construed according to their terms, and that these terms are conclusive as to the agreement between the parties, *but that the references therein to drafts and other documents may be explained by parol evidence.*" (p. 2.)

It is finally concluded that:

"The transaction between the parties was evidenced with clarity and definiteness by the written acceptance agreement, by the written documents accompanying the agreement, by the written acceptances indorsed by the bank and by the letters exchanged and by the credit released to the Richfield Oil Company upon nine drafts presented to the bank for acceptance *and needed no additional parol evidence to identify the subject-matter of the contract and establish its terms.*" (p. 8.)

As indicating what parol evidence was admissible to identify the security, it is stated:

"But the delivery of the bills of lading clearly identifies such consideration." (p. 7.)

The court's lack of authority to limit the introduction of parol evidence to the delivery of the bills of

lading, where parol evidence is admissible, will hereafter be discussed. Presently, however, we are alone concerned with pointing out to the court that the legal proposition involved in this portion of its decision was not discussed by counsel representing either of the parties, and was given no attention whatever by appellee, for the obvious reason that appellant in its brief made no such contention, but on the contrary, expressly and in appropriate language admitted that because of the silence of the acceptance agreement upon this subject, parol evidence was admissible to prove what foreign drafts were under the acceptance agreement; that is, whether, as claimed by it, all of the drafts, or whether, as asserted by appellee, only the so-called short term drafts had been so deposited. That the statement just made by appellee is neither extravagant or fanciful can be readily ascertained from an examination of appellant's brief, where at page 109 the following is made:

> "These cases (referring to cases cited by appellee) merely hold that where a contract is on its face incomplete, extrinsic evidence of extemporaneous parol agreements may be introduced. They were cited by the court in support of its conclusion *that since the acceptance agreement is blank as to the drafts deposited thereunder, parol evidence was admissible to prove which drafts were, and which were not so deposited.* **There can be no question about the correctness of this ruling.**"

An examination of appellant's brief will disclose that its argument was that in the *conversations* occurring between Hall and Pope representing Richfield,

and Gilstrap and its other officials representing appellant, it was definitely understood that **drafts** should be deemed as security for the acceptances. Statements to this effect are so frequently repeated in appellant's brief that their reproduction would occupy many pages of this petition. For instance, in stating the issues herein involved, it is said by appellant:

> "There cannot possibly be other issues than these:
>
> (1) Were the drafts, the proceeds of which are the subject of this litigation, deposited under the acceptance agreement? * * * If they were, the second question is no longer in issue. * * *" (p. 11.)

In the statement of its position appellant states:

> "Although appellant refused to advance to Richfield by means of acceptances or otherwise *a sum in excess of the amount of certain sight or short term drafts, appellant's contention is that* **all drafts** *were nevertheless deposited as security for acceptances issued and to be issued,* and consequently were deposited under and pursuant to the acceptance agreements." (p. 12.)

Still further, appellant states:

> "If, in spite of the overwhelming evidence of **conversations, acts and records** of both Richfield Oil Company and appellant in support of the contention that the *drafts in dispute were deposited under the acceptance agreement* it should be determined that *they were not so deposited, then admittedly, they were at least deposited for collection.* * * *" (p. 13.)

Later on in its discussion under the title "**all the drafts in litigation were deposited by Richfield with appellant under and subject to the acceptance agreements, pursuant to the security for the general indebtedness of Richfield to it**" is found the statement:

> "The question presented by this phase of the case can be answered only from necessary and proper inferences *to be drawn from the facts and circumstances* **for the record is barren of any express agreement between Richfield Oil Company and appellant** *stating whether the drafts in question were or were not to be placed under acceptance agreements.*" (p. 19.)

And still further along in its brief, appellant states:

> "It is the contention of appellant that every draft deposited with it during the period commencing with October 8, 1930, and ending on January 15, 1931, was deposited as security under acceptances and consequently under the acceptance agreement." (p. 27.)

And in arguing why it was understood that the long term drafts as well as the short term drafts were placed under the agreement, appellant asserts:

> "Furthermore, just because the acceptances were actually paid as they matured from the proceeds of drafts is not evidence that appellant had any guaranty at the inception of these transactions that such would be the case. Conceivably, a great number of the drawees of the drafts might default, failing to pay entirely, or delaying payment for such a period of time that the acceptances would still be unsatisfied at the maturity of the 180 day drafts. In any such event,

these drafts would have had actual value as security. These *probabilities* were sufficient to necessitate the deposit of all drafts as security for all acceptances, and they *completely explain the statement of Mr. Lipman and Mr. Hall* (hereinbefore quoted) that appellant would be willing to advance money on *Richfield's foreign drafts.*

It is submitted that the foregoing arguments demonstrate that a *real and substantial* reason existed for the deposit and acceptance of all the drafts in question as security for all the acceptances. * * *'' (p. 52.)

These quotations from appellant's brief must satisfy this court that appellant's position was, *first,* that because of the silence of the acceptance agreement upon the subject, parol evidence was admissible to identify and define the character of the securities by which the acceptance agreement and acceptances were supported; and, *second,* that upon all of the parol evidence introduced, including the *negotiations* and *declarations* of the parties, as well as the *correspondence* of appellant, it was proved that all of the drafts and not, as contended by appellee and found by the lower court, only the short term drafts were deposited as such security. In view of these concessions and arguments on the part of appellant, it was but natural that appellee should fail to anticipate the position taken by this court that the only parol evidence that was entitled to consideration was the "delivery of the bills of lading". That no such discussion was engaged in is clearly shown by reference to page 105 of appellee's brief where, under the title

"the acceptance agreements being silent respecting the securities to which they relate, parol evidence was admissible for the purpose of identifying said securities and also to establish the agreement relating to the remaining drafts" it is said:

> "Imputing legal stability to these agreements, notwithstanding such silence, it must be apparent *that parol evidence was admissible for the purpose of identifying the securities to which the agreement related and upon which* its provisions would *become fastened.* This must necessarily be so because in the absence of such parol evidence the agreements themselves would be entirely innocuous and of no materiality in this controversy. While in the court below this legal proposition was disputed, or at least not conceded, appellant here admits that the rule is as stated because in its brief it is stated: * * *" (Italics ours.)

Then follows quotation from appellant's brief at page 109, hereinabove noted.

With great respect, but with equal earnestness, appellee insists that he is entitled to a rehearing of this important controversy for this reason alone. He ought not to be deprived of a judgment to which in good faith he believes he is entitled without being accorded the opportunity of discussing upon its merits the legal proposition here given consideration.

II.

THE DETERMINATION BY THIS COURT THAT PAROL EVIDENCE WAS INADMISSIBLE TO ESTABLISH THAT THE SUBJECT MATTER OF THE ACCEPTANCE AGREEMENT DATED OCTOBER 4, 1930, AND THE CONSIDERATION FOR THE ACCEPTANCES RELEASED THEREUNDER CONSISTED SOLELY OF FOREIGN DRAFTS, AND THE CHARACTER OF SUCH DRAFTS, IS IN CONFLICT WITH THE THEORY UPON WHICH THE TRIAL WAS CONDUCTED BY BOTH PARTIES, WITH THE ADMISSIONS OF APPELLANT, INVOLVES A MISCONCEPTION OF THE WRITTEN EVIDENCE UPON WHICH SUCH DETERMINATION WAS REACHED AND LACKS JUSTIFICATION IN THE RECORD.

The bank in its brief concedes that the acceptance agreement does not identify the securities, by which it is to be supported, and that resort to parol evidence was necessary to identify such securities. In its argument it claimed that the parol evidence introduced establishes that the long, as well as the short, term drafts were deposited as such security. This situation is given recognition by the court in its opinion, where it states:

> "It is agreed that the acceptance agreement, although in writing, does not sufficiently identify the documents or security which is the subject-matter of the contract between the parties **without the consideration of parol evidence.**" (p. 7.)

Notwithstanding this concession, this court later states:

> "The security given to the bank for such acceptance is not indicated by the written acceptance agreement alone, other than by the word 'merchandise' and 'goods'. But the delivery of the bills of lading clearly identifies such goods.
> * * *

A consideration of the writings exchanged without the aid of any oral evidence other than the fact of delivery of such documents shows that the security of the bank for its liability under its acceptance of the drafts presented to it was to be merchandise in transit on board the 'Silver Hazel' and 'Silver Ray' which was described in the acceptance agreement as 'merchandise' and also as 'goods' and that in order to effect the pledge of this cargo the Richfield Oil Company *transferred its bills of lading thereof, properly assigned, to the bank,* together with foreign bills of exchange drawn upon the purchaser of the goods represented by the bills of lading which would enable the bank to realize upon the value thereof by receiving from the purchaser the price thereof." (p. 7.)

* * * * * * *

"It is clear that during the voyage, by reason of the possession of the bills of lading, and under the terms of the acceptance agreement the bank was secured by the entire value of the cargo. The transaction between the parties was evidenced with clarity and definiteness by the written acceptance agreement, by the written documents accompanying the agreement, by the written acceptance endorsed by the bank, and by the letters exchanged and by the credit realized to the Richfield Oil Company upon nine drafts presented to the bank for acceptance and *needed no additional parol evidence* to identify the subject matter of the contract and establish its terms." (p. 8.)

In reaching this conclusion just quoted, it is obvious that the court inadvertently failed to appreciate that, while the acceptance agreement signed by Rich-

field was the usual form of acceptance agreement utilized by appellant in transactions, to which such form was applicable, it was not the form of agreement which was adaptable or should have been used to reflect the agreement actually negotiated by the parties.

It also inadvertently failed to give consideration to the uncontroverted evidence that the officials of Richfield, participating in the negotiations, were entirely unfamiliar with acceptances and acceptance agreements and their mechanism, as well as the conceded fact that the blank space reserved in the acceptance agreement for the description of the securities to be utilized was intentionally left blank, because at the time of its execution and delivery, the parties did not know what drafts were to be deposited, and likewise because it was intended from time to time to deposit additional drafts thereunder.

That there is no conflict whatever in the record with respect to these matters can quickly be shown.

The error into which this court has unconsciously crept is readily traceable to a misconception of that portion of the acceptance agreement reserved for a description of the securities by which it is to be supported and the court's omission to give effect to the evidence showing that a *"form of acceptance"* was used which was not at all adaptable to the transaction which was negotiated and consummated. This misconception is undoubtedly due to the circumstance that appellee failed to present this phase of the controversy in its fullness due to appellant's admission that

"drafts" constituted the security for the execution and release of the acceptances.

To uphold the determination reached by the court with respect to the point under consideration would be to substitute an agreement not contemplated by the parties for one intended by them and into which they actually entered. That the statement just made is in accord with the evidence will quickly be demonstrated by us.

That part of the acceptance agreement which is herein involved reads as follows:

> "To Wells Fargo Bank & Union Trust Co.—San Francisco.
>
> Dear Sirs:
>
> We hand you herewith, for acceptance, the following drafts:
>
> | Number | Date | Covering following merchandise | Amount |
> |---|---|---|---|
> | | Oct. 6 | | $150,000 |
>
> Marks Numbers Description
>
> .....
> .....
> .....
> .....
>
> Payable in San Francisco to the order of ourselves"

The proposed agreement was a printed form. It will be observed that although executed the only insertions were "Oct. 6" under the word "Date" and "$150,000" under the word "Amount". These insertions refer to the drafts drawn by Richfield on itself

delivered to the bank for acceptance. The agreement, however, is entirely silent with respect to the security for such acceptances. *Nowhere are bills of lading referred to,* nowhere are even the drafts drawn upon the consignees named in the bills of lading, mentioned. This circumstance of itself is both persuasive and significant. It tends strongly to establish that the transaction was not the one usually engaged in involving the financing of shipments through acceptances, the payment of which was secured by the shipping documents including the bills of lading and the drafts drawn in connection therewith.

Inasmuch as no *"goods"* or *"merchandise"* is referred to or described therein, no ground existed for holding as against the evidence introduced by both parties as well as the finding of the lower court, that the "bills of lading" were deposited as such security; and if by parol the appellant could establish (which it did not do) that the bills of lading, as well as the drafts, were deposited as such security, why appellee could not, by the same character of evidence, establish that one or more drafts were agreed upon as security and not the bills of lading or all of the drafts, is, we submit, incomprehensible to us. It would seem that the mere statement of this proposition demonstrates its own integrity.

But, aside from the silence of the acceptance agreement just alluded to, a resort to the testimony will prove conclusively:

(a) That the printed acceptance agreement was a *mere printed form* used to subserve the

convenience of the parties and was not the form of agreement adaptable to the transaction being consummated;

(b) That the officials of Richfield were ignorant of the use of acceptances and their mechanics;

(c) That both parties recognized and conceded that drafts, and drafts alone, constituted such security;

(d) That the evidence of both parties established that drafts, and drafts alone, were to be the subject-matter of such agreement;

(e) That the bills of lading, as stated in the opinion, *were never assigned to appellant,* but were delivered to it as appellant's representative to be delivered to the consignee upon the acceptance of the drafts which were intended and agreed should alone be such security; and

(f) That the so-called "Lyons' letter" was written by an official of Richfield having no knowledge whatever of the details of the transaction; that it was not acted or relied upon by appellant and that no comparable letter ever accompanied any of the other drafts or bills of lading delivered to appellant.

(a) The printed acceptance agreement was a mere form used to subserve the convenience of the parties and was not the form of agreement adaptable to the transaction being consummated.

This subject-matter is given recognition in the opinion of this court in the following language:

> "This acceptance agreement was upon the **form** used by the bank and most of the provisions therein *were no doubt printed.*" (p. 7.)

The fact is, as an examination of the original acceptance agreement will disclose, that the entire acceptance agreement (with the exception of the signature of the party and the insertion of "October 6th—$150,000") is printed, and excepting as to such insertion none of the blanks therein set forth were filled in.

W. J. Gilstrap, assistant manager of the Foreign Department of appellant bank, who, on its behalf negotiated the agreement, upon this subject testified:

> "This acceptance agreement contemplates a description of the drafts presented to the bank for acceptance. Nothing was filled in on the agreement. The agreement also contemplates that where documents are turned over to the bank as security for acceptances the documents themselves should be identified on the face of the agreement. The agreement contemplates on its face that the bank shall have in its possession, at the time the agreement was signed and at the time the drafts were accepted and released, the documents or the the security, **which securities shall be designated upon the face of the agreement.** * * *" (R. p. 403.)

Emphasizing the reason why the securities were not inserted in the acceptance agreement, Gilstrap further testified:

> "* * * that the acceptance agreement did not stipulate the exact amount of acceptance, that is the exact amount for which each acceptance was drawn, because we did not know, nor did they know, nor did anyone know, in what amount the acceptances would be issued and when they would be issued. That would be dependent upon the collections which later would be forwarded to us. Likewise, no mention could be made, as I told Mr. Pope, of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us. Rather than have them have to execute a new acceptance agreement each time that a new agreement was asked for or each time that they sent us a new collection, I explained to Mr. Pope that this one agreement was expected to be a blanket one." (R. pp. 371-2.)

And shortly thereafter he further testified:

> "I also explained to Mr. Pope that if for any reason the proceeds of the bills that may be deposited with us were not received by us in time to meet any maturing acceptances the deficiency that the Richfield Oil Company might have to make good might be in part or in whole obtained by renewal acceptances *either against bills which were originally put in as security for the original acceptances, or against new bills which might later have been deposited;* in other words, on renewal acceptances against some bills against which the first 90 day acceptances were issued,

or as against any later bills that might have been deposited. * * *'' (R. pp. 373-4.)

Mr. Homer E. Pope, one of the officials of Richfield who participated in the negotiations upon this subject, testified:

''The first time I saw this acceptance agreement (Plff's. Ex. 16) was a few days before we came up to San Francisco. I did not discuss its contents with anyone. I did not make any inquiry as to why there were blanks in the agreement. I believe that subject came up during our conversation with Mr. Gilstrap. To the best of my memory I believe something of this nature was said by Mr. Gilstrap, 'As you will be depositing acceptances from time to time under this arrangement and **drafts** under this arrangement, all of which you can not identify now, it is impossible to fill in those blanks at the present time.' We could not give by number and reference on October 6th or 7th **drafts** that we would deposit on October 10th or 12th. But none the less it might be that drafts of October 10th or 12th were intended to apply under the agreement.

As I remember it, something was said to the effect that reference to specific **drafts** was left blank in the acceptance agreement in order to provide for the deposit of **drafts** in the future thereunder, the numbers and description of which were at the time of the execution of the agreement unknown. I don't remember anything having been said to the effect that the reason for the blanks in the agreement was to avoid the necessity of a new acceptance agreement every time an acceptance was issued against certain **drafts.**'' (R. pp. 313-4.)

That the transaction was not the normal acceptance transaction involving foreign commerce is likewise shown by the evidence given by Gilstrap upon cross-examination with respect to the "Acceptance Register" kept by appellant, his testimony being

> "There is nothing in this acceptance register indicating the character of the security that was located under the acceptances or under the acceptance agreement." (R. pp. 393-4.)

(b) The officials of Richfield were ignorant of the use of acceptances and their mechanics.

Prior to the transactions here being considered, none of the foreign business engaged in by Richfield had been based upon acceptances. The procedure involving the use of acceptances as well as acceptance agreements, was something with which the officials of Richfield having its foreign business in charge were entirely unfamiliar. That such lack of familiarity was known to appellant is shown in its brief in which it states:

> "Prior to this time Pope, who testified at the trial of this action, was ignorant of the mechanics of an acceptance credit. His visit was solely for educational purposes so that he would be in a position to introduce into the office of Richfield the proper method of handling this method of deposit drafts for collection." (Def's. Br. p. 22.)

That Hall was likewise unfamiliar with acceptances is shown by the testimony of Gilstrap wherein he states:

> "I suggested to Mr. Hall that if the business was an extension of credit it might be more

> economically handled, from Richfield's point of view, by means of bank acceptances rather than by a direct discounting of foreign collections. I am positive that I suggested that to Mr. Hall and that Mr. Hall did not suggest it to me." (R. p. 369.)

And further,

> "On October 6th Mr. Hall, accompanied by Mr. Pope, came to my desk. Mr. Hall told me that Mr. Pope had been sent to educate himself with every detail of the acceptance business; that it was entirely new to him *as it was also to the Richfield Oil Company,* and they wanted Mr. Pope to familiarize himself with every detail of it so that he could handle their end of the arrangement." (R. p. 371.)

This evidence is corroborated by the evidence of Pope (R. pp. 261-2) and Smile Luenberger (R. p. 430.)

(c) Both parties recognized and conceded that drafts, and drafts alone, constituted such security.

It would be impossible within the confines of a petition for rehearing to here reproduce the evidence upon this subject. We will content ourselves, however, with some of the many references upon this subject contained in appellant's brief, to some of the evidence introduced during the trial elicited from witnesses called by appellant bank and to references to appellee's brief wherein it is contended that the evidence sustains the finding of the lower court that only short term drafts were deposited under the acceptances.

(1) References to appellant's brief.

In its preliminary statement of the facts, appellant, in describing the mechanics of the acceptance transaction, states:

> "The mechanics of the acceptance method differ from those involved in the ordinary draft collection transaction in that the customer bank first executes an acceptance agreement which specifies a sum up to which the customer may draw upon the bank by means of acceptances based *upon drafts deposited for collection*. Thereafter, when the customer deposits drafts for collection he draws acceptances (drafts) on the bank in the amount agreed upon **based upon the drafts.** * * * When the acceptances mature according to their terms the bank pays the holders thereof *and reimburses itself from the proceeds of the drafts which have been deposited as aforesaid.* * * * **Such an acceptance agreement in favor of appellant was executed by Richfield Oil Company.** * * *" (App's. Br. pp. 2-3.)

In its statement of the issues, appellant states:

> "There cannot possibly be other issues than these:
>
> (1) Were the **drafts** the proceeds of which are the subject of this litigation, deposited under the acceptance agreement and therefore subject to the provisions hereinbefore quoted therefrom?" (App's. Br. p. 11.)

In stating its position the bank uses the following language:

> "Although appellant refused to advance to Richfield, by means of acceptances or otherwise,

> a sum in excess of the amount of certain sight or short term drafts, appellant's contention is that **all drafts were nevertheless deposited as security for the acceptances issued and to be issued** and consequently were deposited under and pursuant to the acceptance agreements. These agreements constituted a contract between Richfield Oil Company and appellant, under the express terms of which appellant was entitled to **hold all drafts and the proceeds thereof deposited under the acceptance agreements** * * *"

And again:

> "If in spite of the overwhelming evidence of conversations, acts and records *of both Richfield Oil Company and appellant in support of the contention* **that the drafts in dispute were deposited under the acceptance agreement,** *it should be determined that they were not so deposited, then admittedly, they were at least deposited for collection.* * * *" (App's. Br. p. 13.)

Under the title "**All the Drafts in Litigation were Deposited by Richfield with Appellant Under and Subject to the Acceptance Agreement Pursuant to the Terms of Which Appellant Held the Drafts as Security for the General Indebtedness of Richfield to it**" will be found the statement:

> "The question presented by this phase of the case can be answered only from necessary and proper inferences to be drawn **from the facts and circumstances, for the record is barren of any express agreement between Richfield Oil Company and appellant stating whether the**

drafts in question were or were not to be placed under acceptance agreements." (App's. Br. p. 19.)

Still later in its brief it is said:

"It is the contention of appellant that every draft deposited with it during the period commencing October 8, 1930, and ending on January 15, 1931, was deposited as security for acceptances and consequently under the acceptance agreement.

That this was the understanding of the officers of appellant and that this understanding was communicated to Hall at the inception of these transactions is conclusively shown by the testimony of both Mr. Lipman and Mr. Hellman corroborated by Mr. Hall." (App's. Br. p. 27.)

And after quoting the evidence of the witnesses referred to appellant, commenting upon its effect, argues:

"In all of this testimony of witnesses on both sides, a line of credit based on **foreign drafts** was referred to." (App's. Br. p. 28.)

And, as illustrating the extent to which appellant was willing to go in order to substantiate its claim that the *drafts* constituted such security, it further argues:

"At the time of the delivery of the first acceptance agreement on October 6, 1930, Richfield Oil Company and appellant contemplated not one transaction, but a continuous deposit of drafts and issuance of acceptances during an indefinite period of time, the limits of which were then

unknown but, as far as could be ascertained, might well be for one, two or several years." (App's. Br. p. 44.)

"With a continuous series of deposits of drafts and issuance of acceptances under one agreement contemplated by the parties to extend over a period of time probably far beyond the date of the maturity of the 180 day drafts, the supposed impossibility of using these drafts as security for acceptances becomes non-existent. On the contrary, the 180 day drafts on Brila Bros. stood as effective and useful security for any acceptances or other obligations permitted or provided for by the acceptance agreement. * * *" (App's. Br. p. 44.)

And commenting upon the blank spaces found in the acceptance agreement, appellant states:

"Each of the acceptance agreements is **blank** as to the drafts and securities which were to be deposited thereunder. Parol evidence was therefore admissible to prove what drafts were so deposited. There is no dispute with regard to this. The very existence of these blanks, however, is mute evidence of the soundness of appellant's contention that a revolving credit was intended, for such an arrangement caused it to be impracticable and impossible to list the drafts deposited or to be deposited under the acceptance agreement." (App's. Br. p. 45.)

In commenting upon the court's findings appellant states:

"Contrary to the court's findings, no distinction was ever made or intended to be made; **all**

> drafts were deposited as security for acceptances, and all were under and part of the transaction which commenced with the delivery of the acceptance agreement on October 6, 1930." (App's. Br. p. 55.)

Its conclusion upon this subject is quite illuminating, its statement being:

> "There was only one transaction inaugurated by and under the acceptance agreement. **All drafts transmitted by appellant to Richfield Oil Company were deposited under the agreement as security for the acceptances; being thus deposited they became by operation of the terms of the agreement security for the general indebtedness of Richfield to appellant.**" (App's. Br. p. 65.)

Without further quoting from appellant's brief we direct the court's attention to the following pages upon which comparable statements appear. (pp. 47, 51, 52, 53, 54, 58, 60, 62.)

These quotations from and references to the argument of appellant in the brief filed by its learned counsel should themselves convince the court that drafts alone, whether short term or long term, or both, constituted the security for the acceptances.

(2) Appellant's evidence itself establishes that the drafts alone constituted the subject-matter of the agreement.

Frederick L. Lipman, president of appellant, in testifying to the conversation occurring between himself and Hall, said:

> "This representative, Mr. Hall, stated that there had been some prior discussion as to this line of business, *and I think I said something to the effect that if these* drafts *were good security, that is, if they were drawn on people we had confidence in,* we would regard those as collateral for an acceptance credit. This representative assured me that the drafts were quite all right. * * * I cannot make a credit for the bank without putting a figure on it. I suggested that the credit might be $150,000 or $250,000. We could not lay much stress between one sum or another *because it was to be governed by these drafts.*" (R. p. 449.)

Frederick J. Hellman, a vice-president of appellant, and in charge of its foreign department, upon the same subject, testified:

> "To the best of my recollection I told Mr. Hall that I thought that we, meaning the Wells Fargo Bank, would be willing to go into such a transaction *advancing them on their collections,* and that I could see nothing that would stop us from doing it, and as long as they had other lines in the bank I would rather consult with Lipman first." (R. p. 436.)

With respect to the conversation with Mr. Lipman he further testified:

> "We went into Mr. Lipman's office and I said to Mr. Lipman that Mr. Hall was representing the Richfield Oil Company; that he was the manager of their export department, and that they had not been very well satisfied down in Los Angeles, and that he had been discussing ad-

> vancing funds **on their collections** in the form of an acceptance arrangement. * * * Mr. Hall told Mr. Lipman * * * that all their collections, or practically all of their collections, were paid without any trouble. Mr. Lipman said he thought it would be all right to open the acceptance credit but he wanted it understood that before we made any advance on their collections we would be able to check up through our foreign correspondents on their foreign customers. * * * Then the question came up of the amount of credit. I believe Mr. Lipman said to Mr. Hall, 'We will advance you $150,000, $200,000, $250,000 **on your foreign collections'**. He said to Mr. Hall that this credit was to remain in force until it was cancelled by either side; that we did not know whether it would work out or not; we did not know what kind of foreign collections they were handling and if it did not work out we reserved the right to cancel the credit. (R. pp. 436-439.)

The evidence of W. J. Gilstrap, assistant manager of the Foreign Department of appellant bank, who negotiated the acceptance agreement with Hall and Pope, clearly shows that "drafts" were to constitute the security for the acceptances. Upon this subject, in detailing his conversation with Hall and Pope on October 6, 1930, he testified:

> "I told him (Pope) * * * that the acceptance agreement did not stipulate the exact amount of acceptance; that is the exact amount for which each acceptance was drawn, because we did not know, nor did they know, nor did anyone know in what amount the acceptances would be issued

> and when they would be issued. *That would be dependent upon the collections which later would be forwarded to us.* Likewise no mention could be made, as I told Mr. Pope, **of the collections which were the security for this particular credit, because for the same reason neither they nor we knew exactly what collections would later be sent us.** * * * I also explained to Mr. Pope that if for any reason *the proceeds of the bills that might be deposited with us* were not received by us and in time to meet any maturing acceptances the deficiency that the Richfield Oil Company might have to make good might be in part or in whole obtained by renewal acceptances **either against bills which were originally put in as security for original acceptances or against new bills which might later have been deposited;** in other words, **on renewal acceptances against some of the bills against which the first ninety day acceptances were issued or as against any later bills that might have been deposited.** (R. pp. 371-374.)

(3) Appellee's contention.

While appellee contended that drafts were to constitute the security for the acceptances, his position was that under the agreement reached by the parties the short term drafts alone should constitute such security, the long term drafts being deposited merely for collection. This phase of the argument is given exhaustive attention in the brief filed by appellee (pp. 25 to 45), to which we respectfully refer the court.

(d) Bills of lading delivered to appellant merely as agent of appellee for delivery to consignee upon acceptance of drafts.

In its opinion this court, in referring to the bills of lading deposited with appellant, states:

> "In order to effect the pledge of its cargo the Richfield Oil Company transferred its bills of lading therefore, **properly assigned, to the bank,** together with foreign bills of exchange drawn upon the purchaser of the goods represented by the bills of lading which would enable the bank to realize upon the value thereof upon receiving from the purchaser the price thereof."

This statement, in so far as it relates to the bills of lading is inadvertently inaccurate. *None of the bills of lading were assigned by the Richfield Company to the bank.* It is the contention of appellee that they were delivered to the bank as the agent of Richfield merely for transmission to its correspondent to be delivered upon the acceptance of the drafts, one of which, to-wit, the sight draft, being the security under the acceptances. The documents in question, including the bills of lading, and the drafts were delivered to appellant bank on October 8, 1930, by Mr. Hall, each set of documents accompanied by a letter addressed to appellant couched in the following language:

> "We are enclosing the following documents covering shipments going forward to Calcutta and Bombay per the (name of steamer)."

After describing the documents the letter proceeded:

> "provided these documents are found to be in order *please forward them to your correspondent bank for collection* requesting them to notify you immediately by way of non-acceptance or non-payment of draft at maturity." (R. pp. 266-269.)

The record is absolutely barren of a suggestion that any of the bills of lading were assigned to appellant. Proof of any such assignment, if made, would necessarily have been produced by appellant. The letters accompanying the documents themselves negative any such inference. Upon delivery of the documents referred to in each letter a receipt was issued by the bank to Richfield covering the drafts alone, which receipts were introduced in evidence. These receipts are not reproduced in the record but their introduction is shown. (p. 271.)

While in the absence of any contrary showing, in view of the judgment of the lower court appellee is entitled to the inference that each receipt conformed to the communication, as a matter of fact, which appellant will undoubtedly concede, each of these receipts is in the following form:

> "We have received *for collection* your items as listed below." (Italics ours.)

It will thus be seen that the trial judge was impelled to construe this transaction and was justified in holding that the evidence showed that appellant acted as the agent of Richfield in transmitting the drafts to its correspondent for *collection* and that they transmitted the bills of lading to be delivered upon the

acceptance of the drafts thus transmitted. Furthermore, there is nothing in any of this evidence tending to prove that the bills of lading were delivered as security for the acceptances.

(e) The so-called Lyons' letter (Defs. Ex. A) is lacking in evidentiary or controlling value.

The so-called Lyons' letter of October 8, 1930, by Richfield's controller is not controlling, is subject to explanation and was fully explained by attendant circumstances. It reads as follows:

> "We are sending by Mr. Hall documents covering a shipment to Birla Bros., Ltd. at Calcutta, India. Will you please release against this shipment $115,000 worth of acceptances made payable at 90 days sight."

The evidence discloses that the writer of this communication was entirely lacking in information respecting the transaction and that in writing such letter he assumed, without having any knowledge upon the subject, that the transaction was shaped as stated. The letter was entirely unnecessary. The acceptance agreement and acceptance to be released had already been delivered to the bank. Hall had in his possession for delivery the documents (including the drafts) accompanied by appropriate communications. The acceptances would have been delivered to him in conformity with the agreement without the communication from Lyons. Such communication could not avoid the agreement already negotiated upon the strength

and in reliance of which the acceptance agreement and acceptances had been and the documents and accompanying communications were to be delivered. The transaction in question was negotiated exclusively by Hall and Pope. Lyons at no time participated therein. At this time Richfield was in dire financial distress and it was essential that funds be obtained at the earliest possible moment. On the evening of October 6th Hall and Pope returned to Los Angeles. On the evening of the following day Hall left Los Angeles for San Francisco bringing with him, among other things, the four Birla Bros. drafts together with two transmittal letters. Ordinarily these letters, with the drafts and documents referred to therein, would have been transmitted to appellant by mail. If such had been the procedure the Lyons' letter would not have been written. Hall came to San Francisco not because it was necessary that the transmittal letters, drafts and documents should be personally delivered, but to enable him to forthwith obtain the $115,000 in order that it could be utilized in Los Angeles before the night of that day. (R. pp. 347-8.) To permit such use, upon the net proceeds of the acceptance being credited to the account of Richfield the deposit slip was telephoted to Los Angeles. Lyons was interested in getting the $115,000 quickly and the letter was written by him with this object alone in view. The details of the transaction had already been agreed upon. The letter did not undertake to restate such details or to modify or restrict them in any manner, nor did it undertake to change, modify or alter

the agreement already made. It was the character and type of letter that any one under like circumstances would have written, the writer never imagining that it would subsequently be characterized as illustrative of the agreement existing between the parties. It could not act as a substitute for the negotiations previously conducted by the parties as well as the agreement entered into between them definitely fixing their rights and obligations.

That the appellant itself attached no importance to the letter is evidenced by the circumstance that its contents were never discussed by the officials of the bank with any of the representatives of Richfield. A conclusive reason why this communication is utterly lacking as an important element in this case is that while it refers to "shipment" the evidence of all the witnesses, including Gilstrap, proves conclusively that the agreement related to drafts and nothing else.

That the Lyons' letter is of no importance and that his understanding was exactly in accord with that testified to by Hall and Pope and that he understood that only short term drafts were being deposited as security under the acceptances, the balance being sent to the bank for collection, is conclusively proven by the correspondence dictated by Pope but read and signed by Lyons, the first written six days after the letter (Def. Ex. A) and the second less than two weeks thereafter. The first letter written by Lyons to appellant after the transmission of Defendant's Exhibit A was dated October 13, 1930, and read as follows:

"Our records show that we have in your good bank a draft reserve for $9,734.16 against which no acceptances have been issued.

If this information is correct please issue one of the drafts which you now hold for $5,000 payable in 90 days.

Thanking you for your courtesy in this matter." (Plff. Ex. 28.)

This letter demonstrates that Lyons' understanding was not only that drafts, but that certain specified drafts, had been deposited as security for the payment of the acceptances issued. No other construction can be given to the letter. His subsequent letter of October 20th, which was written while Mr. Gilstrap was in Los Angeles and after he had conferred with the officials of Richfield (R. p. 394) confirms the statements just made. In this letter, because of the absence of Gilstrap, addressed to Mr. Leuenberger, Lyons states:

"In talking with Mr. Gilstrap Saturday he informed us that we might use our collection No. 103010 as No. 46843 on La Paz, Bolivia, as reserve against acceptances. Under these acceptances would you please issue an acceptance for $10,000 to mature in 90 days? * * *" (Plff. Ex. 30.)

These two letters were dictated by Pope and signed by Lyons immediately following the institution of the transactions involved when the parties had clearly in mind the details of the agreement made and long before any dispute or controversy arose over the sub-

ject of the agreement, or what drafts were deposited under the acceptance agreement.

With these two letters before us, regardless of all other testimony upon the subject, the lack of importance of the Lyons letter becomes obvious.

We believe that the foregoing must convince this court that its determination of this branch of the case was unwarranted. There is, however, a legal proposition involved to which we desire to invite its attention. If, as determined by this court, and as admitted by appellant, parol evidence was admissible to identify the securities which the parties agreed should support the acceptance agreement and the release and delivery of the "acceptances", what possible legal justification can exist for the court to hold that only certain of such parol evidence should be given consideration and that all remaining evidence—although admissible—was lacking in legal force or stability?

If, as contended by appellee, the agreement between the parties was that certain drafts, and none others, were agreed to constitute such security, how can such agreement, if established, be nullified merely because in order to obtain the acceptance of such drafts it was essential to deliver to appellant possession of the bills of lading so that they in turn could be delivered to the consignee upon the acceptance by such consignee of one or more of the drafts which, or the proceeds of which, according to the agreement, were to be held by appellant as security for the acceptances?

If appellant bank agreed to act as the agent of Richfield in obtaining the acceptance of certain drafts drawn by Richfield on its foreign customers, and for such purpose obtained possession of certain bills of lading to be delivered by it to the consignee upon acceptance of the drafts, and likewise agreed with Richfield that upon the delivery to it of the drafts to be thereafter accepted, together with bills of lading, it would execute and release certain acceptances upon the understanding that the drafts or certain of the drafts thus drawn upon Richfield's foreign customers was to constitute the security for such acceptances, such transaction would unquestionably be free from legal objection. It would be an agreement which the parties had a legal right to enter into. It would be an enforceable agreement if established. It would be an agreement which could be established by parol, if not evidenced by a writing. In the instant case it is claimed by appellee that such an agreement was in fact entered into between Richfield and appellant bank and that inasmuch as the acceptance agreement failed to specify the security to which it referred, the character and identity of such security could be properly established by parol.

If, by parol evidence, it could be proved that the bills of lading constituted such security, it is inconceivable why by the same character of evidence it could not be proved that the drafts, or some of them, were agreed to constitute such security in lieu of the bills of lading.

In the case under consideration the appellant, conceding the admissibility of parol evidence, offered testimony in support of its claim that both drafts, to be accepted upon delivery of the bills of lading, constituted the security for the acceptances issued by it. On the other hand, appellee claimed that only the short term drafts were agreed to constitute such security. Both parties, however, agreed that drafts, and not the bills of lading, constituted such security. The dispute between them was not whether drafts constituted such security, but whether *all* or only a *certain portion* of these drafts were thus deposited.

Having conceded the admissibility of such parol evidence, the court should not have laid down the rule that only a part of such parol evidence can be considered and that all of the other evidence upon the subject must be rejected.

We submit that there is no justification for any such legal declaration.

III.

IT IS DEFINITELY PROVED THAT ALL FOREIGN COLLECTIONS SHOULD BE DEEMED TO BE SEPARATE AND APART FROM OTHER BUSINESS OF RICHFIELD WITH AND ITS FINANCIAL OBLIGATIONS TO APPELLANT BANK.

With respect to the proposition above entitled, this court in its opinion states:

> "The appellee contends that the agreement of the bank, as testified to by Hall and Pope, to

keep the account of the foreign business separate was in effect a waiver of the banker's lien. This arrangement was made according to the testimony of Hall and Pope as a matter of convenience because of Hall's agreement with Richfield Oil Company concerning commissions. Nothing was said at the time of the agreement to keep the accounts separate about the banker's lien and as we have already pointed out, the express written agreement was that the proceeds of the bills of exchange deposited under the acceptance agreement should be available to apply to any indebtedness due from the Richfield Oil Company to the bank. This arrangement, instead of being a waiver of the banker's lien, was an assertion of a lien as to all collections covered by the acceptance agreement. In the general agreement or arrangement testified to by Hall to keep the foreign accounts separate from the other accounts of the Richfield Oil Company there was no distinction between the bills of exchange which matured in less than ninety days and those which matured in more than ninety days, although he testified that the former were and the latter were not to be used as a basis for acceptances after the expiration of ninety days. According to Hall the agreement was that the foreign exchange business should be kept separate, not that there should be two separate accounts in the foreign exchange department, one on a short term and the other on long term bills of exchange. The two types of bills of exchange were separated in their dealings solely because of the refusal of the bank to issue acceptances upon bills of exchange which were not payable within ninety days. There was no contract, express or implied,

> to treat the two types of bills of exchange differently with relation to the banker's lien unless it can be said that the express assertion of the lien as to the bills of exchange included in the acceptance agreement was an implied waiver of the lien as to those not included. * * * A mere separation of the deposit accounts in a bank as a matter of convenience would not operate as a waiver of the banker's lien, particularly where there was no agreement or understanding as to the disposition of the account."

We respectfully, but with confidence, submit that this portion of the court's decision is based upon a misconception of the evidence with respect to the so-called Hall agreement, and a misunderstanding of appellee's position with respect to the application of the so-called Hall agreement to the two types of draft. Such misconception illustrates the wisdom of the rule in favor of the presumption attaching to the trial court's findings. To subserve the convenience of the court and ourselves we will deal with these two propositions in their inverse order.

(a) Appellee does not claim that any distinction was made between the two types of drafts in the so-called Hall-Pope agreement.

Appellee's claim that the Hall-Pope agreement to which reference will hereafter be made, absolved from appellant banker's lien the proceeds of the long term drafts, was not based upon the assumption that any such distinction was either discussed or reached with respect to the application of the agree-

ment to keep the foreign business entirely separate and apart from Richfield's other business and affairs with the appellant bank. This agreement, as testified to and as proved, related to and embraced *all* of Richfield's foreign business with appellant bank. The reason why this latter agreement was not enforceable as against the short term drafts, or their proceeds, was solely because of the other agreement that these short term drafts and their proceeds should constitute the security for the acceptance agreement and the acceptances released thereunder. The moment that the short term drafts came under the acceptance agreement, it of course was realized that they and their proceeds became subject to its terms. One of its terms was that the security actually deposited under the acceptance agreement

> "shall also be held by you as security for any other liability from us to you whether then existing or thereafter contracted." (R. p. 253.)

These provisions of the acceptance agreement necessarily created a contractual lien as against the drafts and their proceeds supporting the acceptance agreement which subjected them to the burden of paying the general indebtedness due from Richfield to appellant bank.

The legal effect of depositing the short term drafts under the acceptance agreement, and as security for acceptances, necessarily changed their status because as and when deposited they immediately became subject to the terms and provisions of the acceptance agreement which removed them from the operation

and effect of the agreement under and in reliance upon which Richfield's entire foreign business was turned over to appellant bank. It was never contended and is not now asserted by appellee that in the agreement under which Richfield's foreign business was turned over to appellant bank any distinction was made or attempted to be made between the long term and the short term drafts. No such distinction had to be made or was contemplated because if the acceptance agreement had not been negotiated the whole of the foreign business, including all drafts, both short and long term, would have been freed from the danger of the exercise of a banker's lien because of any antecedent indebtedness. As a matter of fact, at the time the transfer of Richfield's foreign business to appellant was first negotiated, acceptances were not only unknown to but not thought of by Richfield or its officials. It was appellant's initiative upon this subject that finally persuaded Richfield to obtain funds by means of acceptances. Prior to that time it financed itself by discounting its foreign drafts. This is shown by Mr. Gilstrap who testified:

> "I suggested to Mr. Hall that if the business was an extension of credit it might be more economically handled from Richfield's point of view by means of banker's acceptances rather than by a direct discounting of foreign acceptances. I am positive that I suggested that to Mr. Hall and that Mr. Hall did not suggest it to me." (R. p. 369.)

It will thus be seen that that portion of this court's decisions relating to the subject-matter just discussed is undoubtedly based upon a misunderstanding of appellee's position and a misconception of the evidence relating thereto.

(b) The agreement between Hall and appellant officials that all drafts and their proceeds should be deemed to be separate and apart from other business of Richfield with and its financial obligations to appellant constituted such drafts and proceeds a special fund and a deposit against which no banker's lien or right of set-off existed.

Although this branch of the case was of the utmost importance to appellee, but meager attention is given to it in the opinion rendered by this court. Apparently the court was of the opinion, as stated by it,

> "that the agreement between the parties involved a 'mere separation of the deposit accounts' (p. 12) and that 'this arrangement was made according to the testimony of Hall and Pope as a matter of convenience because of Hall's agreement with Richfield Oil Company concerning commissions'." (p. 12.)

These statements we submit are unjustified by the evidence. In reaching this conclusion the court has entirely overlooked not alone the circumstances surrounding the agreement and which induced and persuaded its making, but the agreement itself. The

statement of Hall that he was entitled to commissions from the foreign business of appellee was merely one of the reasons why he was interested in keeping the foreign business separate from all other business of Richfield including its indebtedness to appellant. But the real basis of the agreement which appellee claims was proved by overwhelming and convincing evidence and found by the lower court to have been entered into, was Richfield's immediate necessities to enable it to carry on its business and survive. It could not and would not have turned over its foreign business to appellant unless it could be assured that the proceeds of its foreign business would not be endangered by any attempt on the part of appellant to enforce Richfield's indebtedness to it by the exercise upon it of its banker's lien.

While the evidence upon this subject is revealed in appellee's brief (pp. 13 to 25) to which we respectfully refer the court, the importance of this controversy to appellee impels us to recall to the court those portions of the record clearly indicating that the court's position with respect to this matter is inaccurate. At the time this agreement was negotiated Richfield owed appellant an unsecured indebtedness of $625,000 evidenced by a promissory note which was to mature on October 10, 1930. In the absence of the agreement referred to, the moment such unsecured indebtedness matured appellant would have been legally authorized to exercise its banker's lien upon all of Richfield's foreign business. The right of a bank to exercise its banker's lien and right of set-off

was known to all of the executives of Richfield including Hall. (R. p. 341.) At this time Richfield was and thereafter continued to be in dire need of funds. (R. p. 341.) The profit upon its foreign business was almost negligible in character and the cost of purchasing and making ready its commodities for foreign shipment, as well as the freight charges thereon, had to be advanced. Faced with these conditions it could ill afford to take the chance of depositing with appellant its foreign collections involving large sums unless it was understood that neither the drafts themselves nor their proceeds when collected, could be utilized by appellant in the extinguishment, either in whole or in part, of an unsecured indebtedness far in excess of the collections entrusted to it. The executive officials of Richfield, as well as Hall, knew that many banks substantial in character existed in California to which no indebtedness was owed by Richfield and to which its collections could readily be entrusted without being menaced by the possible exercise of a banker's lien or right of set-off. That Richfield would deposit its foreign drafts for collection with appellant in the absence of a special agreement preventing the exercise of its banker's lien or right of set-off is unthinkable. Aside from this situation, Hall was interested in the financial success of the foreign department of which he was manager because he had not only built it up but upon such success depended the amount of compensation to which he was entitled. It would indeed be remarkable if under the proven circumstances Hall would have failed to insist upon the agreement testified to by him. That the

agreement was made is clearly shown by his evidence. In August, 1930, during the first conference occurring between him and Gilstrap, Hall testified:

> "I discussed with him the general situation, Richfield Oil Company's collections, and stated that I was contemplating turning over all of the Richfield collections, being foreign collections, as far as possible to them. I explained to him that I would be responsible as far as possible for those collections and watch them * * * *I asked him to remember that any transactions were to be considered separate from other transactions of the Richfield Company*—the entire transactions, monetary, the collection of drafts for us or any other business connected with the Foreign Department of Richfield Company." (R. p. 340.)

> "I stated to him that I had an interest in all collections which were emanating from the Foreign Department *and that I wanted him to consider that it was a separate business arrangement from any other business which Richfield had with Wells Fargo Bank. Mr. Gilstrap said that he understood my position.*" (R. p. 341.)

After his preliminary conference with Gilstrap Hall was taken by Mr. Hellman to Mr. Lipman, president of the bank. As to what occurred upon this particular subject Hall testified that he told Lipman

> "* * * that I had a personal interest in the collections of the Department, *and I wanted it considered to be a separate transaction from any obligations or any transactions other than those of the Foreign Department—Richfield obligations I mean.* Lipman then *said, 'That is good' or 'that is excellent'.*" (R. p. 343.)

And upon cross-examination he reiterated that he stated to Mr. Lipman

> "that it was to be understood that this further credit was to be kept separate and be a distinct arrangement with the Foreign Department." (R. p. 358.)

Upon the visit of Hall and Pope to the bank on the morning of October 6, 1930, this arrangement was again made the subject of discussion. According to Hall, after Gilstrap, at the request of Pope, had telephoned to Mr. McKee,

> "I there reiterated my former conversation with Mr. Gilstrap that if the acceptances were used it must be definitely understood that it was a separate transaction from any other transaction in a monetary way which Richfield had with Wells Fargo Bank. I was following orders in that respect from Mr. McKee." (R. p. 346.)

Mr. McKee, whose orders Hall was following, was one of the chief executives of appellee. The above testimony is corroborated by Pope, who testified:

> "During the course of the conversation Mr. Hall said he wanted the transaction with the Foreign Department considered a thing apart from the regular transactions of Richfield with the bank."

And still later

> "As I remember it, the substance of his statement was that he wanted the Foreign Department business of Richfield kept as a separate and distinct transaction from other business that Rich-

field might do with the Wells Fargo Bank." (R. pp. 325-6.)

The testimony of Hall and Pope above quoted was corroborated by Frederick Lipman, president of appellant, who was called as a witness on its behalf. He was the officer to whom all of the other officials of the bank referred in determining the credit which should be extended to Richfield on its foreign collections. To him Hall was brought after conferring with Gilstrap and Hellman. Lipman's testimony was:

> "It seems to me that as the conversation came to an end Mr. Hall said something to the effect that he represented the Foreign Department and not the general treasury relations with the company *and he did not want the two mixed up; he wanted them kept separately.*"

This testimony of Mr. Lipman is corroborated by Frederick J. Hellman, vice-president of appellant. Testifying to the conversation between Hall and Lipman, he stated:

> "As I remember it, we then stood up and were going out of the door and Mr. Hall said to Mr. Lipman, 'I want it understood'—**No, not that.** He said, 'You must realize that I am not in the financial end of the business; that I am only the manager of the foreign department, and I will have to get the consent of my superior to put this credit through.' He further said that he knew we were giving them a line of credit of $625,000, *and if this acceptance credit was going to interfere with the line downstairs, he knew they would not consent to it, and he wanted the acceptance*

credits separate from the loan downstairs." (R. p. 438.)

On cross-examination Hellman testified:

> "Mr. Hall said he wanted these acceptance transactions to be considered separate from the loan line. * * * *He used the word 'separate', and he referred to the loan of $625,000.* The essence of the statement is that he wanted it considered separate from the loan line of $625,000." (R. pp. 445-6.)

Several months later, when appellant finally exercised its banker's lien upon the drafts here involved, Hall came to San Francisco and protested against appellant's action. During the discussions which followed, one of the reasons given by Hall why the action taken by the bank was without justification was that it had made the agreement to keep these transactions separate and apart from all other business with and financial obligations of Richfield. He endeavored to refresh the memories of Mr. Gilstrap and Mr. Eisenbach with respect to the agreement. (R. pp. 350-1; 364.) Not only were such statements not denied (R. p. 351) but Hall testified that Gilstrap said

> "that Wells Fargo Bank was going to grab that money. I asked him why and he said they were going to do it, exercising a lien on it for other indebtedness owed the bank. I stated that I was very surprised since they had agreed not to touch any of the collections of the Foreign Department with Richfield Oil Company. He said he was sorry but that was the decision of the bank." (R. p. 350.)

But, aside from this conclusive evidence establishing the making of the agreement, the subsequent conduct of appellant clearly proves that until May 8, 1931, when it attempted to seize the proceeds of some of the drafts, the existence of the agreement was constantly given recognition by it. As already stated, the promissory note executed by Richfield evidencing its unsecured obligation to appellant, matured on October 10, 1930. In the absence of the agreement under discussion, at any time after October 10, 1930, appellant would have had a right to exercise its alleged banker's lien upon the drafts deposited with it for collection, or its right of set-off against their proceeds. Notwithstanding such alleged right, not only did appellant fail to exercise said banker's lien or right of set-off until May 8, 1931, but between October 10, 1930, and May 8, 1931, it credited to the account of Richfield and thereafter to the receiver, the net proceeds of certain drafts theretofore collected by it, totaling $39,469.53. Of these sums $31,719.99 was so credited without any request of any kind emanating from appellee or the receiver. (R. pp. 333-4.) The remaining $7749.58 was deposited to the receiver's account in accord with appellant's letter of March 5, 1931 (Appellant's Ex. 108) after the receiver had called its attention to its wire of January 16, 1931. (Plffs. Ex. 3.) * * * Appellant's failure to exercise its banker's lien and right of set-off between October 10, 1930 and January 16, 1931, notwithstanding its anxiety to obtain payment of the unsecured indebtedness due to it by appellee, is directly traceable to its recognition of the so-called Hall agreement.

It must be clear that the evidence to which we have just invited the attention of the court establishes something more than a mere "keeping upon the books of separate accounts to subserve the convenience of either Richfield or one of its employees." Any such arrangement would have been readily acquiesced in upon the request of Hall made to either Gilstrap or one of the tellers of appellant. If an arrangement such as that alone were contemplated, it would not have been the subject-matter of discussion between Hall, representing Richfield, and Gilstrap, and later Hall and Mr. Lipman, president of appellant, and Hall and Hellman. Nor would it upon the subsequent visit of Hall and Pope have again been the subject-matter of conferences and negotiations between them and Gilstrap.

Keeping in mind that the foreign collections of Richfield were vital to its very existence and constituted part of its "life's blood" and that the purpose of the agreement was to render available to it at all times the proceeds of such foreign business, except to the extent necessary to meet the acceptances and protect such proceeds against being subjected to the payment of the unsecured indebtedness due to appellant, as well as the character of the negotiations occurring between the parties, it is not logically possible to reach any conclusion other than that the agreement that the business of the Foreign Department including the drafts and their proceeds should be deemed to be separate and apart from other business with Richfield and its financial obligations to appellant, and constituted such drafts and proceeds a special fund

and deposit as against which no banker's lien or right of set-off existed. If such was the agreement, then under the authorities appellant was prohibited from subjecting such foreign collections to its banker's lien or right of set-off.

For a statement of the legal principles applicable to and citation of the authorities in their support we respectfully invite the court's attention to appellee's brief, pp. 139 to 156.

In any event, the interpretation of the negotiations and conversations between the parties, what the agreement was and what was intended thereby were questions of fact for the trial court and not the appellate court to determine. The trial judge who patiently listened to the evidence and observed the witnesses testifying concluded that the agreement was as characterized by appellee. Appropriate findings upon this subject followed. (R. pp. 184-5.) Such determination by the trial judge should be conclusive upon this court.

IV.

APPELLANT BANK WAIVED ITS BANKER'S LIEN AND RIGHT OF SET-OFF AS AGAINST ALL COLLECTIONS OF RICHFIELD EXCEPTING THOSE SPECIFICALLY DEPOSITED UNDER THE ACCEPTANCE AGREEMENTS.

We cannot help but feel that the conclusion reached by this court in determining the proposition above entitled adversely to appellee must have been induced by our apparent inability to picture to the court the situation existing at the time the telegrams were ex-

changed, the information which was then in the possession of appellant bank, and the purpose intended to be accomplished by such exchange of telegrams.

While we are convinced that these telegrams, read in the light of the surrounding circumstances, demonstrate a waiver of appellant banker's lien and right of set-off as contended, we have no hesitation in stating that the best that can be said from the standpoint of appellant is that there might exist a doubt as to their construction and interpretation. Assuming such to be the fact, however, the finding of the lower court with respect to such construction and interpretation based upon the communications themselves, as well as all of the surrounding circumstances and facts, together with the subsequent conduct of the parties, is conclusive upon this court and should not be avoided on appeal.

The conceded situation existing at the time the telegrams were sent, briefly stated, is as follows:

For some months prior to January 15, 1931, Richfield was involved in financial difficulties. It owed various banks in excess of ten million dollars, no part of which was secured. (R. p. 205.) It was indebted in a large sum to a number of merchandise creditors, some of whom were pressing for payment. It was only with much difficulty that it was able to meet pay-rolls, freight charges and current indebtedness due public utilities which could not be delayed. Litigation was threatened which, if commenced and prosecuted to final judgment, would not only result in the sacrifice of its properties but would prevent it from carrying

on its business and in all probability force it into bankruptcy. This distressing situation was known to most of Richfield's creditors but particularly to its bank creditors including appellant.

To avoid bankruptcy a receivership was determined upon by Richfield's creditors including its bank-creditors. Appellee was appointed receiver and on the same date ancillary receiver in this district. (R. pp. 205-8.) Each of these orders appointed appellee receiver "of all the *property, assets and business* of Richfield." (R. p. 90.) By the terms of each order appellee was authorized

> "forthwith to take and have complete and exclusive control, possession and custody of all of the *property* and *assets* of Richfield (R. p. 92) and to continue, manage and operate the business of the defendant * * * to the end that the operation of the business of the defendant should not be interfered with or interrupted." (R. pp. 93-4.)

It is quite apparent that the principal purpose sought to be achieved by the appointment of the receiver *was to enable the business* of Richfield to be carried on in the expectation that as a result of such procedure the indebtedness, or a considerable part of it, due to the creditors would ultimately be liquidated. A copy of the order appointing appellee receiver was immediately transmitted to the creditor banks of Richfield, whereupon some of them in the exercise of their right of set-off, applied the cash balances of Richfield in partial payment of the indebtedness due to them. (R. pp. 203-6.) Learning of such action and realizing that unless there was made available to him

all cash balances and all other credits belonging to Richfield in the possession of said banks, it would be impossible to carry on its business, a meeting was called by the receiver for January 16, 1931, which was attended by representatives of all of the creditor banks excepting appellant and one other bank. (R. p. 205.)

During this meeting the receiver explained to those present its purpose and among other things said,

> *"I told them that it was not only necessary that I have the balance restored, but that I have their assurance that the normal flow of business would be allowed to go on. Collections were coming in, of course, that if they merely restored my balances that it would be obvious that it would be impossible to carry on the business if collections were seized. I asked them if they would not restore to me all funds that might be available."* (R. pp. 206-7.)

He also explained that the business of Richfield was dependent upon the receiver having available

> "all of its funds; that is, **all assets of every character"** * * *

so that the receiver might endeavor to continue the business in some operating form **and that without funds such action was utterly impossible.** (R. p. 228.)

According to the witness, Edward J. Nolan, chief executive of the Bank of America, Richfield's largest creditor, the receiver also informed the bank that

> "all the **credits and all the funds and all the assets, especially the current assets** that belonged to the company must be turned over to him;

otherwise he could not carry on the affairs of the company." (R. p. 241.)

That the drafts deposited with the bank for collection, as well as the collections themselves, were *credits* and *assets* of Richfield to which, as well as to the cash balances, the receiver was referring is likewise shown by Mr. Nolan, his testimony upon this subject being:

> "I understand balances in bank would be such items as are deposited for credit and collected, * * * **I would regard foreign drafts deposited with a bank for collection as credits and when the drafts are collected and the money comes into the possession of the bank I would regard that as cash balances.**" (R. pp. 245-6.)

Upon cross-examination he testified:

> "Foreign drafts can be considered as credits." (R. p. 246.)

And on redirect examination:

> "If a draft is deposited in a bank by a depositor or a merchant for collection I would regard that as one of its *credits.*" (R. p. 247.)

It is therefore manifest that while the receiver was directly concerned with the restoration of the cash balances offset, and while he was insistent that other banks should agree not to offset cash balances in their possession, it was imperative for him to insist that all bank credits should agree that **all assets and credits** in their possession belonging to Richfield should be made available to him, otherwise he would retire from the receivership and the company would go into bankruptcy.

At the time of this meeting, while some of the banks had checks and credits in transit, the only banks which had foreign drafts in their possession were Security-First National Bank of Los Angeles and appellant. (R. p. 216.) These facts were known by the receiver and also by the representative of the Security Bank. That appellant bank must have known that the Security Bank had such collections can clearly be inferred from the fact that its credit official constantly kept in intimate touch with its financial condition and affairs. (R. pp. 451, 455.)

It was agreed by the bankers present—as to some of them, however, subject to ratification by their respective banks—that if those banks which had offset the cash balances would restore such balances, and if all banks would agree to make available to the receiver all **credits in their possession, none of the banks would exercise their banker's lien or right of setoff against funds or credits** of the Richfield Company. (R. p. 432.) Accordingly, at the conclusion of the meeting a telegram was prepared by some of the bankers present, in cooperation with the receiver, to be sent to each of the banks for the purpose of carrying into effect the object sought to be accomplished by the meeting. Among those participating in the preparation of the telegram was the representative of the Security Bank which, as already shown, had in its possession foreign drafts not yet collected. (R. pp. 209-242.) This circumstance is important because his understanding of the telegram sent (Plffs. Ex. 2) and appellant's response (Plffs. Ex. 3) is shown by the action of the Security Bank in making available

to the receiver not only its cash balances *but all collections subsequently made by it upon these foreign drafts.* The telegram which was prepared and transmitted to appellant bank (Plffs. Ex. 2) reads as follows:

> "As receiver I am ordered by federal court to take *over all assets including cash in banks* Stop While you have undoubted *right of offset* such *right if exercised would seriously cripple receivers operations* It is necessary therefore to request that all banks restore to receiver full cash balances Stop Please therefore transfer such funds to a new account on your books in my name as receiver Evidence of my authority and signature cards will follow by mail Stop Local banks have indicated *they will acquiesce in this program.*"

A reading of this telegram will disclose that the *program* referred to was the taking over by the receiver of **"all assets including cash in banks"**. The right of offset referred to was the right of offset as against **"all assets including cash in banks"**. The program in which "local banks have indicated they will acquiesce" is the turning over to receiver of all **assets including cash in banks.** The telegram therefore clearly indicated to appellant that the agreement to be entered into was to turn over to the receiver **"all assets** of the Richfield Company **including** cash in its possession", and that as to such **assets** and cash its right of offset should be waived.

At this point it may be well to direct the court's attention to its decision wherein, with respect to the

meeting which preceded the sending of the telegram this court said:

> "The appellee also introduced evidence to show the subsequent conduct of the other banks with relation to their waiver of the agreement. Their conduct was not brought home to the appellant and is of no significance whatever, and even if brought to the attention of the bank after the transaction was closed would be without significance. There was no estoppel." (p. 17.)

We submit there is no justification for such holding because according to the uncontradicted testimony, immediately upon the conclusion of the conference and before any wires passed between the parties at the request of the receiver and in order that appellant might be fully cognizant with what had occurred, Mr. Nolan telephoned to Mr. Eisenbach, vice-president of appellant and in charge of its Credit Department, and acquainted him fully with what had occurred, his testimony being:

> "During the course of my conversation with Mr. Eisenbach I stated to him *the substance of what had occurred at the meeting of the bankers.* (p. 243.) * * * It was intended to be the agreement with the banks with some amplification * * *. The amplification was not that something was desired besides the telegram itself, but to explain to the banks not present the dire condition of the company and the importance and necessity of returning the balances at once or else the company would be forced into bankruptcy." (R. p. 245.)

Later on he testified:

> "* * * I told Mr. Eisenbach it would be necessary that the receiver have all the funds of the Richfield Oil Company for the purpose of continuing the business and to avoid bankruptcy. * * * I tried to pass on to Mr. Eisenbach just what took place at the meeting that morning." (R. p. 246.)

And that appellant had notice of the action of the other banks is shown by the receiver's telegram to appellant dated January 22, 1931, and the answering wire of appellant to receiver dated January 23, 1931, which wires appear upon pages 13 and 14 of this court's decision. In response to the receiver's wire of January 16, 1931, appellant answered:

> "Replying telegram we are willing to restore in your name as receiver Richfield's balance in checking account provided we are notified by you that all company's banks have taken similar action. **We are holding certain collections as security for acceptances Please understand we continue to reserve all our rights for bankers lien against these collections."** (Plffs. Ex. 3.)

It will be observed that this telegram was written and sent by Julian Eisenbach, the very official with whom Nolan had had his conversation. It will also be observed that this telegram was not delivered to the telegraph office until 6 P. M., which was long after the Nolan-Eisenbach conversation occurred. It should also be observed that if the receiver had merely been interested in cash balances or if the Security Bank had not been interested in learning that

the foreign collections in the possession of appellant bank would be made available to the receiver, no reason would have existed for the conversation between Nolan and Eisenbach.

It is impossible for us to appreciate how, under the proven circumstances, this court concluded that it was justified in holding that by its telegram appellant reserved its banker's lien on all credits and foreign drafts in its possession, and that its *sole* purpose was merely to agree to restore the offset balance of Richfield. At the time of its preparation appellant had before it the order appointing the receiver containing the language above quoted. (R. p. 203.) It knew that the receiver, to carry on the business of Richfield which was the purpose of his appointment, had to have available to him **all credits** of Richfield. It had before it the receiver's wire prefaced with the statement:

> "I am ordered by federal court to take *over all assets,* including cash in banks"

and it had in mind the information given by Mr. McDuffie to the banks, as well as the discussions occurring at that meeting, the substance of which had been conveyed to it by Nolan. Furthermore, it had in its possession CERTAIN foreign collections as security for the acceptances previously executed by it then outstanding. The inclusion within its telegram of the language

> "We are holding certain collections as security for acceptances Please understand that we continue to reserve all our rights for banker's lien against *these* collections"

would be both unnecessary and meaningless if its *sole* intention was to agree to restore the offset balances. That information had already, in apt language, been conveyed by the wire.

That the receiver understood the telegram to mean what is here contended is conclusively shown by his testimony both upon direct and cross-examination. (See appellee's brief, pp. 70-71.) That the telegram was so construed by the Security Bank is made manifest by the fact that it not only abstained from exercising any right of set-off as against the cash balance of Richfield in its possession, but subsequently collected and paid to the receiver $152,524.03.

As further emphasizing the understanding of the remaining creditor banks with respect to the meaning of appellant's wire, it was proved that when they learned that appellant had appropriated the collections here involved, according to McDuffie

> "Every one of them protested not only that they felt there was no right in it, but also that they, themselves, never would have restored their balances had they thought Wells Fargo was reserving in its mind this character of right." (R. p. 237.)

But in addition to what has here been said upon this subject, appellant itself considered its telegram of January 16, 1931, as reserving a lien *only* upon the drafts under the acceptances. The receiver was appointed on January 15, 1931. On February 26, 1931, the last group of acceptances aggregating $25,000 was paid in full. On February 24th it had in its posses-

sion $23,530, the proceeds of certain drafts collected by it. Between February 14th and February 26, 1931, it collected $9249.28 upon four drafts from which it deducted $1499.70 which, with the funds previously collected, paid the acceptances in full. Appellant then had remaining in its possession $7749.58, the proceeds of these foreign collections. With respect to this sum it advised Richfield by letter (Plff's. Ex. 107):

> "the remainder of the proceeds total $7,749.58, we are holding in accordance with notice given you in our wire of January 16th."

In view of the receiver's understanding of the wire of January 16th and concluding that his recollection of its contents was inaccurate, he requested appellant to repeat such telegram, which was done. Upon receipt of this wire appellee undoubtedly compared it with appellant's original telegram of January 16th (Plff's. Ex. 3) and observing no difference in the wires and being convinced as he always had been that appellant was without authority to retain the proceeds of these drafts under its reservation contained in such wire, on March 3d wrote appellant the following letter (Plff's. Ex. 106):

> "Referring to your letter of February 26th, advising us of payment of certain drafts totaling $9260.81, less certain charges amounting to $11.53, leaving a balance of $9249.28 from which you are taking $1499.70 to meet the balance due on acceptances February 26th, leaving the sum of $7749.58 to be credited to our account, *and referring to your telegram of January 16th,* I beg

> to inform you that all banks transferred the total amount of deposit to the credit of Richfield Oil Company of California on January 15th, 1931, to the credit of William C. McDuffie, Receiver. *I will therefore appreciate it if you will kindly credit the remainder of the proceeds so mentioned about $7749.58 to the credit of Richfield Oil Company of California, William C. McDuffie, Receiver, and advise us as soon as this transfer has been made.*"

Thereupon and on March 5, 1931, *and without any further communication passing between appellee and appellant,* appellant credited the receiver's account with $7749.58 and wrote to appellee a communication stating, among other things:

> "In accordance with your request we are crediting the account of William C. McDuffie, Receiver Richfield Oil Company of California, with the sum of $7749.58.
>
> We are also crediting this account with $11082.51 representing proceeds of collection No. 13106 of the Richfield Oil Company, particulars as per memorandum attached." (Plffs. Ex. 108.)

It must be obvious that when the language of the wire of January 16, 1931, was called to the attention of appellant and when it recalled the circumstances under which it was prepared and the purpose sought to be achieved by the receiver, as well as all bank creditors of Richfield in negotiating the agreement, it realized that the receiver was entitled to the funds and that it had no claim against them. Further-

more, it voluntarily and without any request from the receiver, turned over to him the additional $11,082.51 referred to in the communication.

Between February 26, 1931, and May 8, 1931, in addition to the four drafts above mentioned and in addition to the $11,082.51, the bank collected the proceeds of nine drafts, the net proceeds of which amounted to $15,381.62, and deposited each of these collections to the account of receiver and this without any affirmative act or request upon the part of the receiver or Richfield.

In connection with this situation it should be noted that whenever a draft was collected and its proceeds credited to the receiver's account a written advice of such action was transmitted by appellant to receiver, and in no instance did appellant, by letter, wire or word of mouth, assert, intimate or suggest that it was reserving or claiming to reserve or had the right to exercise any banker's lien or right of set-off as to these drafts or their proceeds.

There is much additional evidence of surrounding circumstances and facts in the record which are clearly pointed out in appellee's brief, but to which, in order to avoid further prolonging this petition, no reference is herein made. We have, however, in our judgment reproduced sufficient of the record to establish that appellant not only waived, but intended to waive its banker's lien as against all foreign collection in its possession excepting those deposited under the acceptance agreement.

But, in any event, as we have had occasion to heretofore point out, the best that can be said in favor of appellant upon this subject is that there might be some ambiguity or uncertainty as to what was intended by the passage of the telegrams, and that therefore resort to extrinsic evidence consisting of the surrounding circumstances and facts—including the construction placed upon the wires by the parties themselves evidenced by their subsequent acts and conduct, was legally proper. The interpretation to be placed upon these telegrams, read in the light of the surrounding circumstances, became a question of fact for the trial court, and not a question of fact for the appellate court. Such determination by the trial court should be conclusive here.

CONCLUSION.

We believe we should apologize for the apparent undue length of this petition for rehearing. Ordinarily in a petition of this character a discussion of the evidence is unnecessary. In this controversy, however, because of the propositions determined by this court, which involved the legal sufficiency of certain of the evidence contained in the record, we had no other alternative. We might justly add, however, that the extreme importance of this litigation to our client, to the Richfield Oil Company and to its creditors made it imperative that this petition be presented in its fullness.

It is respectfully, but with great confidence insisted, that for the reasons indicated a rehearing of this controversy should be granted.

Dated, San Francisco,
July 6, 1934.

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
July 6, 1934.

THEO. J. ROCHE,
Of Counsel for Appellee and Petitioner.